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IN THE Supreme Court of the United States

October Term, 1964
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

PETITION OF THE STATE OF CALIFORNIA FOR REHEARING
and
BRIEF IN SUPPORT OF PETITION

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IN THE

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October Term, 1964
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

PETITION OF THE STATE OF CALIFORNIA FOR REHEARING.

The State of California presents its petition for rehearing of this Court's decision of May 17, 1965, under Rule 58 of the Rules of the Supreme Court, on the following ground:

> Assuming the correctness of the Court's premise that California's rights under the Submerged Lands Act of 1953 are to be determined by the criteria set forth in the Convention on the Territorial Sea and the Contiguous Zone, the Opinion of May 17, 1965, fails to consider adequately and to apply properly the doctrine of "historic bays" to Santa Monica and San Pedro Bays.

Specifically, the Opinion of May 17, 1965 is alleged to be erroneous in the following respects:

I

The Court's determination (Opinion, p. 34) that Santa Monica and San Pedro Bays are not historic bays is contrary to all prior authority and contrary to the general understanding within the United States and throughout the world.

II

The Court overrules (Opinion, p. 34) the decisions of the California Supreme Court in *People v. Stralla,* 14 Cal. 2d 617, 96 P. 2d 941 (1939) and the Federal District Court in *United States v. Carrillo,* 13 F. Supp. 121 (S.D. Calif. 1935) without considering that said decisions are soundly based upon four hundred years of prior history and legal precedents dating back to the earliest days of our Republic.

III

The Court fails to consider the history of Santa Monica and San Pedro Bays and the clear language of California's Constitution of 1849 which establish beyond question that these Bays have always been within California's boundaries and jurisdiction.

IV

The Court implies (Opinion, pp. 33-34) that California's assumption of jurisdiction over these Bays was a unilateral act by the State Legislature, whereas in fact California's boundaries, including these Bays, were approved by Congress.

V

The Court cites (Opinion, pp. 33-34) a portion of United Nations Document A/CN.4/143 (1962) for the

proposition that concrete acts of enforcement are required in evey case to establish historic bays and fails to note the immediately following language in said Document to the effect that such concrete acts are unnecessary where, as here, no foreign nation has ever challenged the exclusive jurisdiction of the adjacent State.

VI

The Court erroneously asserts (Opinion, p. 34) that the United States disclaims that any of the disputed areas are historic inland waters, whereas neither the Department of State, nor any other officer, department, or agency of the United States charged with the execution of foreign policy has ever made such a disclaimer with regard to either Santa Monica or San Pedro Bay, and in fact, the State Department has strongly indicated that said Bays constitute inland waters.

Respectfully submitted,

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Dated: July 30, 1965.

Certificate.

I, Richard H. Keatinge, one of the attorneys for the State of California, defendant herein, and a member of the Bar of the Supreme Court of the United States, certify that the foregoing petition for rehearing is filed in good faith and not for delay.

Dated: 30th day of July 1965.

RICHARD H. KEATINGE,
Special Assistant Attorney General, State of California.

IN THE

Supreme Court of the United States

October Term, 1964
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

Preliminary Statement.

The Opinion of May 17, 1965, represents the first occasion this Court has had to consider the criteria for determining the base line for measuring the lands quitclaimed to the states by the Submerged Lands Act of 1953 (67 Stat. 29; 43 U.S.C. §§ 1301-15). In light of the uncertainty of these criteria, California, in its earlier briefs, has been forced to discuss a multiplicity of issues based upon a number of alternative assumptions. The said Opinion rejected California's basic contention that the Submerged Lands Act entitled the State to the seabed and subsoil of all lands within its historic boundaries, as approved by Congress. This contention was exhaustively argued in California's briefs, and Mr. Justice Black's excellent dissenting opinion demonstrates that

our arguments were clearly conveyed to the Court and were rejected only after thorough and careful consideration. Thus, although we strongly believe that Congress intended that the State's historic boundaries should be a decisive factor in applying the Submerged Lands Act, it is not California's intention to re-argue this basic contention.

The Court has now enunciated for the first time the principle that the determinative criteria for establishing the "coast line" under the Submerged Lands Act are derived from international law, and that the Convention on the Territorial Sea and the Contiguous Zone (U.N.Doc. A/Conf. 13/L.52) constitutes the definitive statement of these criteria. Thus, California now has its first opportunity to file a brief which focuses upon the single issue as to how the principles set forth in the Convention should be applied to California's coast. It is the State's position that the Court, itself having to consider a multiplicity of complex questions, has failed to give adequate consideration to the question of historic waters and specifically the question as to whether Santa Monica and San Pedro Bays are "historic bays" within the meaning of paragraph 6 of Article 7 of the Convention. The question of historic inland waters is covered as one of six "subsidiary issues" at the end of the Court's majority opinion and is disposed of in less than three pages. This short discussion, in our opinion, contains a number of errors and misconceptions, which we respectfully wish to call to the Court's attention. The doctrine of historic waters is not a mere "subsidiary issue," but is of central significance to California, to later states claiming rights under the Submerged Lands Act, and to the Nation as a whole,

California is fully aware that rehearings are rarely granted by this Court, and we have not requested reconsideration of any issues as to which the State has had an opportunity to make a full presentation, and which appear to have been fully considered by the Court. We submit that such is not the case as to the issue of the status of Santa Monica and San Pedro Bays as historic bays, and that this case uniquely requires a rehearing on this issue for the reasons hereinabove set forth.

I

Santa Monica and San Pedro Bays Are Consistently Recognized Throughout the World as Inland Waters of the United States.

This Court, at page 34 of its Opinion, rejects the significance of the case of *United States v. Carrillo*, 13 F. Supp. 121 (S.D. Calif. 1935) on the ground that the district court's holding that San Pedro Bay was within California, not Federal, jurisdiction resulted in a dismissal and therefore cannot be regarded as an assertion of jurisdiction. The Court disposes of *People v. Stralla*, 14 Cal. 2d 617, 96 P.2d 941 (1939) on the ground that it constitutes the only assertion of criminal jurisdiction over this Bay of which this Court was aware. California strongly urges that the significance of these decisions lies not in the specific acts giving rise to the controversies therein, but rather in the fact that the decisions were soundly based upon an historical status established long before these controversies arose and upon legal precedents dating back to the earliest days of our Republic. At this point we shall demonstrate that the Court's position with respect to the *Stralla* and *Carrillo* decisions, and as to the status of these Bays is

directly contrary to the general understanding throughout the world, as evidenced by official publications of the United States Department of State, by authoritative international law texts and journals, and by actual reliance on these decisions in the conduct of foreign relations. These authorities uniformly, and to our knowledge without exception, sustain California's position that Santa Monica and San Pedro Bays are historic bays and inland waters of the United States.

a. Official State Department Publication.

Of primary significance is the official *Digest of International Law,* issued in 1940 by the Department of State and written by its then Legal Adviser, Green H. Hackworth. As stated in the Preface to this *Digest,* "... For the most part the Digest represents the position of the Government of the United States on the subjects discussed as revealed by the voluminous records of the Department of State and to a lesser degree by decisions of the Federal courts, opinions of attorneys general, etc." Chapter V of this *Digest* is entitled "National Jurisdiction and Territorial Limits," and the first section of that chapter (§ 83) is entitled "The National Domain." In this section Hackworth first quotes the case of *Cunard Steamship Co., Ltd. v. Mellon,* 262 U.S. 100, 122 (1923) including the following language:

> "It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its do-

> minion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. . . ." I Hackworth, *Digest of International Law* 569 (Dept. of State Publication 1506, 1940).

Then the Department of State's Legal Adviser adopts the following language from the case of *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 242-43, 252 Pac. 722 (1927):

> ". . . By the terms of the treaty of Guadalupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1848, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. *By virtue of this treaty the United States assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of California* and for a considerable though perhaps indefinite distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast." I Hackworth, *Digest, supra,* at 569-70 (Emphasis added.)

Although the *Ocean Industries* case dealt specifically with Monterey Bay, it is noteworthy that the *Digest* quotes that portion of the opinion which recognizes that the United States assumed jurisdiction over *all* bays along the California coast.

Later in the same chapter Hackworth quotes the following language from *United States v. Carrillo, supra,* (13 F. Supp. at 122), holding that San Pedro Bay was part of California:

> ". . . The Constitution of California (Const. Cal. 1849, art. 12) in its boundary description provides that the 3-mile limit shall be followed, and that the bays and harbors along the coast are included. It would seem to follow logically that United States national and California state sovereignty have always been in accord with this rule.
>
> . . .
>
> "It seems, therefore, and I so decide, that the Bay of San Pedro is that body of water lying landward from a line drawn from Point Lasuen to Point Firmin, and that the sovereignty of the United States and the territory of the state of California extends three miles to seaward from such line. . . ." I Hackworth, *supra,* at 694.

b. International Law Texts and Journals.

Authoritative texts and journals published both in this country and abroad uniformly cite the *Stralla* and *Carrillo* cases for the proposition that Santa Monica and San Pedro Bays are inland waters of the United States. 8 *Annual Digest of Public International Law Cases,* 169-70 (1941) (published in London and citing *Carrillo*); 9 *Annual Digest of Public International Law Cases,* 133-40 (1942) (citing *Stralla*); 34 *American Journal of International Law,* 143-53 (1940) (citing *Stralla*); Colombos, *The International Law of the Sea* 168 (5th ed. London 1962) (citing *Stralla* and *Carrillo*); Bouchez, The *Regime of Bays in Interna-*

tional Law, 236-37 (1964) (citing *Stralla*); and Strohl, *The International Law of Bays,* 281-83 (1963) (citing *Stralla* and *Carrillo*). The last three publications by Dr. Colombos, Dr. Bouchez, and Commander Strohl are noteworthy as three of the most recent authoritative texts on the international law of bays, all published subsequent to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. Dr. Colombos' book has also been published in French, Italian, Russian, Spanish, German, Portuguese, and Greek editions. Dr. Bouchez's book contains a "discussion of the existing historic bays," and it is noteworthy that his discussion includes but six bays in the entire United States as historic bays: Penobscot Bay, Long Island Sound, Delaware Bay, Chesapeake Bay, Monterey Bay and Santa Monica Bay. (Bouchez, *supra,* 216-37.)

Commander Strohl strongly approved the holding of the *Stralla* case that Santa Monica Bay constitutes inland waters, using the following language:

> "In this case we see the clear need for an exception to the mathematical definition of a bay. It was a matter of removal of a public nuisance which could operate with impunity in sheltered waters if such waters were high seas. Neither by the semi-circular area rule nor by the then more commonly accepted 10-mile rule could Santa Monica Bay be classed as a juridical bay. Santa Monica Bay is no less of a shelter today than in 1939. The Court's opinion has shown us a number of criteria which, in its eyes, justified classing as a bay this arm of the sea. Much emphasis was placed upon common usage in the past."

Strohl, *International Law of Bays, supra,* at 282. Strohl's discussion of the principal decisions holding that Santa Monica, San Pedro, and Monterey Bays are inland waters is especially illuminating and reflective of modern opinion:

> "Reverting for a moment to the overall conceptual framework of this book, these cases of California bays invite our attention to the navigation interest. As we have noted from time to time bays have been associated with harbors and shelter. Other things being equal, greater shelter is provided where the arm of the sea has a penetration proportionally greater than the width of the entrance. But to generalize on this relationship with a view toward arriving at an overall definition of a bay would tend to exclude certain arms of the sea where by reason of generally good weather or shelter from certain prevailing winds, the rather open configuration of the body of water does not at all preclude its being thought of in a very real sense as a bay by the inhabitants and Government of the littoral State. Thus exceptions, on historical grounds, should not necessarily be thought of as confined to bays whose openings happen to exceed in breadth the agreed upon maximum. As in the case of the Senator Schröder there can be a threshold of logical absurdity in denoting some vague concavity a bay, but where this threshold may be seems difficult to ascertain and certainly a relationship in dimensions the inverse of what appear to be generally considered in bays, is not an unreasonable possibility." *Id.* at 283.

c. Actual Reliance Upon Decisions Relating to California Bays in Conduct of Foreign Policy.

Even more significant than these textual discussions is the actual reliance upon the decisions relating to California's Bays in the conduct of international relations. In 1950 the International Law Commission requested all Governments of Members of the United Nations to furnish it with texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to various topics, including the Regime of the High Seas. See U.N. Document A/CN. 4/19, Yearbook of the International Law Commission 1950, II, 52. The United States' memorandum in reply to this request was as follows:

> "Since the high seas are bounded by territorial waters, the delimitation of territorial waters becomes of moment to the regime of the high seas. The United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore, with the exception of waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State: . . ." Yearbook of the International Law Commission 1950 II, 60, 61.

The memorandum then cites numerous authorities, including both *United States v. Carrillo, supra,* (holding that San Pedro Bay constitutes inland waters) and *Ocean Industries, Inc. v. Superior Court, supra,* (dealing with Monterey Bay) in support of the American view that bays "unquestionably within the jurisdiction of the adjacent State" are to be excepted from the general rule that the shore constitutes the baseline for measuring the territorial sea.

Another example of reliance upon these decisions in the actual conduct of international affairs is the "Reply of Norway" filed by Norway in the *Anglo-Norwegian Fisheries Case* ([1961], I.C.J. Rep. 116) set forth in III "Written Statements," *Pleadings, Oral Arguments, Documents, Fisheries Case (United Kingdom v. Norway)*. In paragraph 409 of its Reply, Norway cited as examples of bays constituting inland waters whose width exceeded ten nautical miles, both "the Bay of San Pedro" and the "Bay of Santa Monica" relying, respectively, on the *Carrillo* and *Stralla* decisions. In paragraph 412 of the Reply, Norway quoted the above cited 1950 memorandum of the United States to the United Nations Secretariat and commented as follows:

> "In testimony of the American practice, the memorandum notes a number of documents, diplomatic and others, in which are included the decisions of 1927 by the Supreme Court of the State of California in the suit *Ocean Industries, Inc. v. Superior Court of the State of California*, regarding the Bay of Monterey, and in 1935, by the District Court in the case *U.S. v. Carillo* [sic] regarding the Bay of San Pedro. But in fact, the Bay of Monterey has an opening to the sea of 18 miles and the Bay of San Pedro of 19 miles. . . ."

This Reply of Norway is significant both as evidencing the recognition by foreign nations of the inland character of Santa Monica and San Pedro Bays, and as evidencing foreign understanding that the citation of the *Carrillo* case in the 1950 memorandum by the United States to the United Nations was an assertion by the United States that San Pedro Bay constituted inland waters.

d. Effect of Convention—Conclusion.

As is made clear by the following quotation of section 78 of the 1962 United Nations study on the *Juridical Regime of Historic Waters, Including Historic Bays,* U.N. Doc. A/CN.4/143, §78 (1962), the purpose of the 1958 Geneva Convention was to *preserve* the status of bays, such as Santa Monica and San Pedro, which have been universally recognized as historic bays:

> "One can, of course, say in a certain sense that an historic title which is expressly reserved, as is the case in articles 7 and 12 of the Convention, thereby is implicitly qualified as an exception. But it must not be forgotten that the whole purpose of making the historic title an exception from the general rule contained in the main provisions of the relevant article is to *maintain* the historic title. It is not the intention, by excepting it, to subject the historic title to stricter requirements but to maintain the *status quo ante* with respect to the title. It would therefore be a fallacy if from the fact that the Convention in certain cases excepts historic rights one would draw the conclusion that the Convention requires stricter proof of the historic title than was the case before the conclusion of the Convention. In reality, the Convention simply leaves the matter, both regarding he existence of the title and the proof of the title, in the state in which it was at the entry into force of the Convention." (All italized in original.)

In summary, distinguished international law authorities have repeatedly and consistently recognized that Santa Monica and San Pedro Bays have the status of

inland waters and there is strong evidence that this is the general understanding both in this country and throughout the world. The United States has failed to cite any instance where this status has been questioned either by judicial decree, textual authority, or the act or declaration of any foreign nation. This universal recognition is especially significant since our research indicates that only seven bays throughout the entire United States (three in California) have received any recognition at all as historic bays in international law literature.[1]

If this Court's decision of May 17 is not modified, it will stand alone as an authoritative statement that Santa Monica and San Pedro Bays are not historic inland waters, and will place a virtually impossible burden upon later states in establishing historic claims to waters not coming within the strict geographical criteria set forth in the 1958 Geneva Convention. Furthermore, this Court's Opinion will undoubtedly be regarded throughout the world as a renunciation by the United States of any claim that these Bays are inland waters. As shown below, no department of the United States Government charged with the execution of foreign policy has ever made such a renunciation, nor even implied that the position of the United States with regard to these Bays is contrary to the universal understanding throughout the world that they are inland waters.

---

[1]The only United States bays generally recognized as historic inland waters in the international law literature coming to our attention after extensive research are Chesapeake Bay, Delaware Bay, Long Island Sound, Penobscot Bay, Monterey Bay, Santa Monica Bay and San Pedro Bay.

II

The Stralla and Carrillo Decisions Are Soundly Based Upon Historical Data and Legal Precedents.

The decisions dealing with California's Bays rely upon and are part of a direct and unbroken line of authorities which include those establishing the historical character of Delaware and Chesapeake Bays, which the United States admits to be "classic examples of waters claimed by the United States on historic grounds." Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, 109 (June 1964). An examination of the authorities cited in Point I of California's present Brief shows that international law writers uniformly cite the decisions relating to California's Bays along with those relating to Delaware and Chesapeake Bays.

One of the earliest United States authorities is Attorney General Randolph's opinion in 1793 on the "Grange," a case involving British seizure of a French ship within Delaware Bay. 1 Ops. Atty. Gen. U.S. 32 (1852). At the outset of this Opinion the Attorney General stated:

> "The essential facts are—
>
> "That the river Delaware takes its rise within the limits of the United States.
>
> "That, in the whole of its descent to the Atlantic ocean, it is covered on each side by the territory of the United States.
>
> "That, from tide-water to the distance of about sixty miles from the Atlantic ocean, it is called the *river* Delaware.

"That at this distance from the sea it widens, and assumes the name of the *bay* of Delaware, which it retains to the mouth.

"That its mouth is formed by the Capes Henlopen and May; the former belonging to the State of Delaware, in property and jurisdiction; the latter to the State of New Jersey.

"That the Delaware does not lead from the sea to the dominions of any foreign nation.

"That, from the establishment of the British provinces on the banks of the Delaware to the American revolution, it was deemed the peculiar navigation of the British empire.

"That by the treaty of Paris, on the 3d day of September, 1783, his Britannic Majesty relinquished, with the privity of France, the sovereignty of those provinces, as well as of the other provinces and colonies.

"And that the Grange was arrested *in* the Delaware, within the *capes,* before she had reached the sea, after her departure from the port of Philadelphia." 1 Ops. Atty. Gen. U.S. at 33. (All italicized in original.)

At page 37 of this opinion appears the following statement:

"These remarks may be enforced by asking, What nation can be injured in its rights by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has ever before had a community of right in it, as if it

were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted. By the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself, and all the waters thereof, (therefore within the jurisdiction of the State of New Jersey,) are comprehended in the district of Bridgetown. The whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, for the length of the Virginia territory, is subject to the process of several counties, to any extent, will become a rendezvous to all the world, without any possible control from the United States. . . ."

This summary of "essential facts" and further observations demonstrates a marked similarity to the facts establishing the historical character of California's Bays:

(1) Santa Monica and San Pedro Bays have been designed as "bays" from their earliest history.[2]

(2) These Bays lie solely within the territory of the United States.

(3) These Bays do not lead from the sea to the dominion of any foreign nation.

(4) These Bays were "deemed the peculiar navigation" of the preceding (Mexican) Government. *Ocean Industries v. Superior Court, supra* (200 Cal. at 242).

[2]See Point III of this Brief, *infra*.

(5) The former government relinquished to the United States by the treaty of cession (*i.e.,* the Treaty of Guadalupe Hidalgo) the full territorial and maritime jurisdiction of such government. *Ibid.*

(6) No other nation can possibly be injured by the exercise of exclusive domestic jurisdiction over these Bays, and indeed, as shown above, nations throughout the world *assume* that the United States has this jurisdiction.

(7) Failure to assert this jurisdiction could result in irreparable harm to the United States, to California, and to the adjacent local communities by greatly limiting the criminal and regulatory powers of the various governmental entities in areas located in the immediate vicinity of important population centers and navigational structures.

(8) As in the case of Delaware Bay, California's Bays were covered by the first revenue collection law pertaining to the area in question. 9 Stat. 400 (1849). This act provided that ". . . all the ports, harbors, bays, rivers, and waters of the main land of the territory of Upper California shall constitute a collection district by the name of Upper California; . . ." The history of Santa Monica and San Pedro Bays, summarized in Point III of this Brief, demonstrates that they were definitely regarded as "bays" at the time of the enactment of the Federal collection law.

(9) Finally, as shown in Point III hereof, Santa Monica and San Pedro Bays, like Delaware Bay, are clearly included within the territorial jurisdiction of the adjacent state.

The only factor upon which the case of the "Grange" may be distinguished from the *Stralla* and *Carrillo* cases is that the occasion for the controversy in Delaware Bay was an act of war which directly involved the foreign relations of the United States. The case of the "Grange," however, was necessarily determined by the status of Delaware Bay *preceding* the facts which gave rise to the controversy, and this status was resolved on the basis of facts which bear a remarkable similarity to those applicable to Santa Monica and San Pedro Bays.

Chesapeake Bay's status as inland waters, and as an historic bay, was determined by the Second Court of Commissioners of *Alabama* Claims, *Stetson v. United States,* No. 3993, class 1; IV Moore, *International Arbitrations,* 4332-41 (1898); I Moore, *International Law Digest,* 741-42 (1906). The crucial factors cited by the court in the *Stetson* case were strikingly similar to, and were largely derived from, the principles laid down in the case of the "Grange," as shown by the following quotation:

> "Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the hold-

> ings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high seas' within the meaning of the term as used in section 5 of the act of June 5, 1872." I Moore, *Digest, supra,* at 741-42.

Both the *Ocean Industries* case, which was the immediate precedent for the *Stralla* and *Carrillo* decisions, and the *Stralla* case rely upon this same language from the *Stetson* case. *Ocean Industries v. Superior Court, supra* (200 Cal. at 246); *People v. Stralla, supra,* 14 Cal. 2d at 629-30). The *Stralla* decision, after analyzing both English and American precedents, concluded as follows:

> ". . . [T]he usage and custom appears to be established to the effect that when, as here, the facts are that the bay is not and cannot become a pathway between nations; that exclusive jurisdiction has been asserted under both the present and former governments; that it has been recognized as a bay and as a harbor within the territorial boundaries of the state as prescribed by the law of the land, the courts have decided in accordance with the jurisdictional claim." *People v. Stralla, supra* (14 Cal. 2d at 631).

Thus, it will be seen that principles laid down by Attorney General Randolph in 1793, re-affirmed by the Court of Commissioners of *Alabama* Claims in the

Stetson case, and applied to California Bays by the California Supreme Court in the *Ocean Industries* case, were the legal bases for the *Stralla* and *Carrillo* decisions. These latter decisions cannot, therefore, be regarded as isolated legal anomalies, but rather must be recognized as sound authorities in the mainstream of American law, not to be overturned lightly.

III

Santa Monica and San Pedro Bays Are Indisputably Included With California's Boundaries.

The Opinion of this Court of May 17, 1965 (at p. 32) recognizes that paragraph 6 of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone specifically exempts "historic" bays from the geographical criteria applicable to other bays. The Opinion further recognizes that historic bays are those over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations. As shown above, American decisions have emphasized that inclusion of specific bays within the legal boundaries and local jurisdiction of the adjacent state are key factors in establishing their historic character.

This Court's decision (at p. 33) states that on the evidence, California's claim that its constitution set a boundary beyond the bays is "arguable." Since California's Constitutions of 1849 and 1879 expressly include within the State's boundaries "all the islands, harbors, and bays along and adjacent to the Pacific Coast" (Calif. Const. of 1849, Art. XII; Calif. Const. of 1879, Art. XXI), it is not merely arguable, but *indisputable* that its bays are included. It may be arguable that the State's Constitution does not necessarily

imply inclusion of the entire over-all unit area, since it is physically possible to include the islands without also including the intervening waters. It is *impossible,* however, to draw the State's boundaries so as to include its bays without running these boundaries from headland to headland in front of these bays. Thus, the only basis for contending that Santa Monia and San Pedro Bays are not within the territorial jurisdiction of the State would be an assertion that they are not "bays" within the meaning of California's Constitution. Nowhere in its briefs filed with this Court does the United States make any such contention, and we submit that on the basis of the evidence submitted by California, such an argument would be entirely untenable.

As shown on pages 131-46 of Volume II of California's "Brief in Support of Exceptions," (April 1, 1964), Santa Monica Bay was designated as a bay from the time of its earliest exploration by Juan Cabrillo in 1542, and such reference was repeated by Cermeño in 1595, Viscaino in 1603, Vancouver in 1793, and upon at least 78 official and unofficial maps dating from 1603 to 1961, including the earliest and all subsequent maps issued by the United States Coast Survey and Coast and Geodetic Surevy. The following language of the California Supreme Court in the *Stralla* case is therefore supported by overwhelming evidence:

> "We conclude that geographically the waters known as Santa Monica Bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a

bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica Bay is one of the bays and harbors included within the territorial boundaries of the state by the Constitution. It follows that the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vincente and Point Dume, and at least for a distance of three miles oceanward from that line, and that such jurisdiction may be exercised by the state for all proper purposes including the prosecution of violators of the penal laws of the state." *People v. Stralla, supra* (15 Cal. 2d at 632-33).

The history and description of San Pedro Bay are set forth on pages 103-130 of Volume II of California's "Brief in Support of Exceptions," *supra.* Highlights of this history which are demonstrative of its ancient and consistent recognition as a Bay are as follows: The Bay was discovered in 1542 by Juan Cabrillo, and was designated as a bay (*i.e.,* the "Bay of Smokes") at the very time of its discovery. It was consistently recognized as a bay by early explorers and cartographers, including Vizcaino in 1602. In 1734 it was described by an early Spanish cartographer as "A Bay, very good for shelter from Northwest, West, Southwest winds." *Id.,* at 107. That this early recognition referred to an area at least as extensive as that referred to in *United States v. Carrillo, supra, i.e.,* a distance of 13.1 miles

(see map, Vol. II, Calif. "Brief," *supra,* opposite 104,) is demonstrated by the quotations of the English explorer Forbes in 1839 who stated that "The Port of San Pedro is a very extensive bay, being sixteen miles from point to point," and the French navigator de Mofras who stated that ". . . It is a great bay which is about fifteen miles from point to point." *Id.* at 108. Almost conclusive of California's contention that San Pedro Bay must be regarded as a "bay" within the meaning of California's Constitution of 1849, is the nearly contemporaneous statement by Professor Bache, Superintendent of the United States Coast Survey, in his official report to Congress regarding the Coast Survey of 1855 that: *"The bay of San Pedro is the most important between San Francisco and San Diego." Id.* at 112. (Emphasis added.)

It is respectfully submitted that even this brief summary of the history of Santa Monica and San Pedro Bays establishes beyond question that California's Constitutions of 1849 and 1879, in their reference to "bays," constitute unequivocal and unmistakable assertions of jurisdiction over these bays. As pointed out in Point II of this Brief, this same history demonstrates that these Bays were included within the first United States collection law applicable to California. 9 Stat. 400 (1849).

IV.

Since California's Boundaries Were Approved by Congress, the Assumption of Jurisdiction Over California's Bays Was Not a Mere "Legislative Declaration" by the State.

After characterizing as "arguable" California's claim that its Constitution included its bays, this Court (at p. 33) characterized this inclusion as a mere "legislative declaration of jurisdiction." At this point, we shall demonstrate that California's boundaries, as set forth in its Constitution of 1849, were not defined merely by declaration of the State Legislature, but were approved by Act of Congress.

The 1849 Constitution was submitted to Congress, which expressly recited California's adoption of this Constitution in the Act admitting California into the Union. Act of Admission, September 9, 1850, 9 Stat. 452. This recital is similar in terms to the recital set forth in the "Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida, to Representation in Congress," June 25, 1868, 15 Stat. 73. In *United States v. Florida,* 363 U.S. 121, 127-128 (1960), this Court held that Congress had, by its acceptance of Florida's readmission constitution, approved Florida's seaward boundaries as set forth therein, even though there was no evidence that Congress had given any special attention to these boundary provisions.

California's case for Congressional approval of its boundaries is much stronger than that of Florida. California's Constitution, like Florida's, was extensively debated insofar as the questions of slavery and the requi-

site republican form of government were concerned.[3] In addition, however, the question of California's constitutionally defined boundaries was thoroughly discussed,[4] including some references to its seaward boundaries.[5] Most importantly, California's position is stronger than that of Florida in that California's Constitution of 1849 was its original admission constitution, while Florida relied upon the boundaries described in its readmission constitution. As stated by Mr. Justice Harlan in his dissenting opinion in *United States v. Florida, supra,* (363 U.S. at 134):

> ". . . [A] State relying on a readmission boundary stands on quite a different legal footing than one relying on an original admission boundary. In the latter instance the fixing of a boundary is a necessary incident of Congress' power to admit new States. A newly admitted State, in the absence of an express fixation of its boundary by the Congressional act of admission or an articulated rejection of its preadmission boundary, may, I think, rely on a presumed Congressional purpose to adopt whatever boundary the political entity had immediately prior to its admission as a State. . . ."

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[3]See, *e.g.,* Senate debates, 22 Cong. Globe, App., 374, 851, 955, 964-65, and 1267; and House debates, 22 Cong. Globe, App., 345, 402, 410, 499, 639, 688, 724, 770, 1133-34. The debates on the admission of California and the attendant problems of the extension of slavery, which were only resolved by the Clay Compromise of 1850, took up fully three-quarters of the time of Congress during the period of the First Session of the Thirty-First Congress.

[4]See, *e.g.,* 22 Cong. Globe, App. 261, 448, 637-38, 651-52 (including quotations of Debates of California's Constitutional Convention of 1849 on State boundaries), 965-67 (also quoting from the debates of said Convention), 1251 and 1396; and House debates, 22 Cong. Globe, App., 410, 453, 462, 515, 523, 566, 640, 688, 721, 747, 769.

[5]See, *e.g.,* Senate debates, 22 Cong. Globe, App. 436, 568, 1415; and House debates, 22 Cong. Globe, App. 346-47, 428-29, 451, 752, and 775.

V

Concrete Action to Enforce the Assumption of Jurisdiction Over California's Bays Was Unnecessary Except to the Extent Required to Maintain That Jurisdiction.

At pages 33-34 of its Opinion, the Court states that ". . . a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim." The Court's authority for this statement was the *Juridical Regime of Historic Waters, Including Historic Bays,* U.N. Doc. A/CN. 4/143, §§ 80-105 (1962). The direct quote at page 43 of the Document upon which the Court's statement was apparently based was Bourquin's statement that:

> "Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations."[6] *Id.,* §98.

We wish to emphasize most strongly, however, the commentary by the United Nations Secretariat which immediately follows this Bourquin quotation:

> "This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken." *Id.,* §99.

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[6]Bourquin, "Les baies historiques" in *Mélanges Georges Sauser-Hall* 43 (1953).

It is submitted that this qualification to Bourquin's statement is directly applicable to Santa Monica and San Pedro Bays. As shown by the above quotation of international texts and journals, these bays are universally recognized throughout the world as constituting historic inland waters of the United States. Like Chesapeake Bay, these bays ". . . cannot become an international highway; . . . [and are] not and cannot be made a roadway from one nation to another."[7] While California has cited extensive evidence of international acceptance of the status of these bays as inland waters, the United States has not cited a single instance in which this status was questioned either by word or deed of any foreign nation. As we shall demonstrate below, the United States, acting through its foreign policy agencies, has never disclaimed the historic status of these Bays. Thus, the scarcity of occasions upon which either the United States or California has had to "express its intent by deeds" actually stems from the strong and undisputed character of these claims, rather than any weakness thereof. It would indeed be ironic if this Court upheld the historic status of inland waters whose character was sufficiently doubtful so as to give rise to foreign disputes, and denied this status where this character was so clear that no foreign nation ever even attempted to dispute it. This principle was well stated by Bustamente y Sirvén, one of the most eminent

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[7] *Cf. Stetson v. The United States,* IV Moore, *International Arbitrations, supra,* 4341; I Moore, *Digest, supra,* 741-42.

international law scholars of his time,[8] in his study preceding the 1930 Hague Conference:

> ". . . In respect to a certain bay, the continuous possession of which is claimed by a coastal State by right of sovereignty, no controversies or difficulties have ever arisen, either on account of its distance from the great maritime and commercial currents of the Globe, or because the opportunity of expounding and solving doubtful questions has not presented itself. *It is inadmissible that such circumstances should suffice to deprive the bay of its historic character. . . .*" Bustamante y Sirvén, *The Territorial Sea,* 100 (1930). (Emphasis added.)

As shown by the *Stralla* case and the *Ocean Industries* case, California has demonstrated that "to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken" with respect to California's bays. Although the *Carrillo* case (in which the Federal District Court refused to apply the "Piracy on the High Seas Act" to the waters of San Pedro Bay on the ground that they were inland waters) may not technically constitute an assertion of jurisdiction, it is an unequivocal announcement by an organ of the United States Government that these were inland waters of the United States and, as noted above, was acknowledged as such by the Department of State and by international law writers throughout the world, and to this day remains unchallenged by any foreign government.

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[8]Bustamente y Sirvén was a Judge of the Permanent Court of International Justice, Professor of Public and Private International Law at the University of Habana, and President of the International Academy of Comparative Law and of the Cuban Society of International Law.

VI

Neither the State Department nor Any Other Agency Authorized to Enunciate the Foreign Policy of the United States Has Ever Disclaimed That Santa Monica or San Pedro Bays Are Inland Waters of the United States.

At page 34 of its Opinion, the Court makes the following statement:

> "The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive."

California respectfully submits that this statement is based upon an entirely erroneous assumption insofar as it relates to Santa Monica and San Pedro Bays. The only disclaimers on record in this case as to the historical character of these Bays are the assertions by the Solicitor General and the Department of Justice representing the Department of the Interior in this litigation. The Department of the Interior and its attorneys, of course, have absolutely no authority to enunciate the foreign policy of the United States. The State Department letters of November 13, 1951, and February 12, 1952 (Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, Appendix A, 6a-18a (July 1964)) express no opinion as to whether or not any of the areas claimed

by California constitute historic bays. The letter of November 13, 1951, expressly excludes historic waters from the scope of its discussion, using the following language:

> "In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference,* 197)."[9] (*Id.* at 11a).

Indeed, the only indications we have as to the State Department's views regarding the historical status of California's Bays are favorable to the State's position. As shown above (in Point I), the Department of State's official digest of international law authorities for the years 1906 to 1940 cites the case of *Ocean Industries, Inc. v. Superior Court, supra,* for the proposition that the United States has assumed jurisdiction over *all* of California's bays (I Hackworth, *Digest, supra,* 569-70), and quotes extensively from the case of *United States v. Carrillo, supra,* including that portion holding that San Pedro Bay, as well as the other California bays, is subject to the sovereignty of the United States and within the territory of the State of California (I Hackworth, *Digest, supra,* 694-95). More significant is the 1950 United States memorandum to the United Nations

[9]The fact that the State Department letters expressed no view as to the historic status of California's Bays was clearly brought out in oral argument in this case in December 1964. (Transcript of oral argument, pp. 203-04); however, this fact was apparently overlooked in the Court's opinion.

quoted on page 13 hereof, citing both the *Ocean Industries* and *Carrillo* decisions as exemplifying the United States' position as to what bays are included within its internal waters. As noted above, the citation of these decisions in the United States memorandum was regarded by Norway in the *Anglo-Norwegian Fisheries Case* as an assertion by the United States that San Pedro and Monterey Bays were inland waters of the United States.

Since the question of the historical status of Monterey, San Pedro and Santa Monica Bays was expressly under consideration by the Special Master at the time the State Department letters of November 13, 1951, and February 12, 1952, were elicited by the Attorney General, it is significant that no questions were asked regarding these specific Bays. See Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, Appendix A, 6a (July 1964). The only reasonable explanation for the United States Attorney General's failure to ask these questions is that, as indicated by the Hackworth *Digest* and the aforesaid Memorandum of 1950, the answers would have been adverse to the contentions of the United States.

Conclusion.

California has demonstrated that if this Court's Opinion of May 17, 1965, is not reheard or modified insofar as it relates to Santa Monica and San Pedro Bays, it will be contrary to all prior legal authorities which have considered the status of these Bays. The historic character of these Bays has been consistently affirmed by international law writers, is recognized throughout the

world, and has never been challenged by any foreign nation. The Department of State, in the course of official correspondence to the United Nations, has specifically cited Monterey and San Pedro Bays as examples of bays regarded as inland waters of the United States, and the authorities it relied upon are equally applicable to Santa Monica Bay. The Court's determination that large portions of these Bays are high seas will create serious limitations upon the governmental powers of Federal, State and local agencies, and confer upon foreign nations and individuals rights which they presently do not even claim. Furthermore, the State has shown that the legal and factual bases of the *Stralla* and *Carrillo* decisions, establishing the historic character of Santa Monica and San Pedro Bays, are indistinguishable from the legal and factual bases of the opinions relating to Delaware and Chesapeake Bays, which bays are conceded by all parties to be "classic examples" of historic inland waters.

The Court's determination as to California's Bays was based upon a number of assumptions which we earnestly believe are completely unwarranted:

1. That the inclusion of these Bays within California's Congressionally approved boundaries and local jurisdiction is arguable or questionable;

2. That the unequivocal assumption of jurisdiction over these Bays required further concrete acts of enforcement, even though this jurisdiction has remained unchallenged and there was no occasion for such further acts; and

3. That the United States has disclaimed that these Bays are historic waters.

We have shown in this Brief that Santa Monica and San Pedro Bays were unquestionably included within California's constitutional boundaries and that these boundaries were approved by Congress. We have also shown that concrete acts to enforce jurisdiction are required to establish the historic status of bays only to the extent required to maintain that jurisdiction, and that the absence of controversy with foreign nations with regard to California's Bays is in fact based upon universal acceptance of this status, and acquiescence thereto by all nations. Finally, and of utmost significance, we have demonstrated that the disclaimer by the United States, which this Court regarded as *decisive,* had no application to Santa Monica and San Pedro Bays.

This Court's ruling that Santa Monica and San Pedro Bays are not historic inland waters, if not modified, will have significant detrimental effects, which will not be limited to California, nor to the particular areas here involved. This ruling will constitute an announcement to the world at large that water areas long regarded as internal waters of the United States are open to unrestricted activities by foreign nations, hostile and friendly alike. It will cast an almost impossible burden upon future states claiming under the Submerged Lands Act in their attempts to sustain their domestic jurisdiction over bays, historically considered to be inland waters but not coming within the strict geographical criteria set forth in the 1958 Geneva Convention. If Santa Monica and San Pedro Bays, which have been accorded uniform international recognition as historic inland waters, are not considered as such by this Court, it is virtually certain that lesser known waters in other

states must be denied this status, regardless of the equities and long usage in their favor.

For the foregoing reasons, California urges that the present is one of the rare cases where justice requires a rehearing by this Court or a modification of its Opinion.

Respectfully submitted,

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